MBF LEASING SDN. BHD.

v.

CHONG KOK LIM & SONS (HOLDINGS) SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[SUIT NO. D3-23-2034-1987]
5 AUGUST 1989

CIVIL PROCEDURE: *Summary judgment under O. 14 - Lease - Defendant not in possession of the leased equipment - Whether sale bona fide - Equipment repossessed before demand.*

The cause of action against the 1st defendant was on a lease agreement. The 2nd, 3rd, and 4th defendants were sued as guarantors and indemnifiers. The 1st defendant fell into arrears in the payment of the lease rentals as a result of which the plaintiff terminated the lease agreement. In the appeal against the O. 14 judgment, the defendants raised the following issues.

1. That the 1st defendant was not in possession of the leased equipment.
2. Plaintiff failed to make a *bona fide* sale of the repossessed equipment.
3. Plaintiff had repossessed the equipment before demand was made.

Held:

[1] The possession of the equipment by a third party does not effect the liability of the 1st defendant as it was an arrangement that was specifically asked for by the 1st defendant.

[2] The sale of the repossessed equipment was *bone fide* in that the sale was advertised twice in local daily and all the defendants were informed of the offer made by the receivers of Lake Golf Hotel Sdn. Bhd.

[3] By virtue of art. 21 of the lease agreement, the plaintiff was entitled to repossess the equipment once the 1st defendant defaulted in payment of the lease rentals.

[Appeal dismissed with costs.]

For the defendant/appellants - Y.C. Yong; M/s. Yip, Yeo & Nasrim
For the plaintiff/respondent - Hishammuddin Hussien Onn; M/s. Skrine & Co.

JUDGMENT

Siti Norma Yaakob J:

In this appeal against an O. 14 judgment, the defendants confined their submission to the following issues.

1. Since the 1st defendant was not in possession of the leased equipment, it cannot be liable under the lease agreement dated 27 February 1986 entered with the plaintiff.
2. Plaintiff failed to make a *bona fide* sale of the repossessed equipment.
3. It is the plaintiff who had breached the agreement as they had repossessed the equipment on 28 April 1987, long before the letter of demand dated 11 May 1987 was sent.

The cause of action against the 1st defendant is on a lease agreement dated 27 February 1986 wherein for the consideration of the plaintiff leasing the items of equipment listed in the appendix to the agreement, to the 1st defendant for a period of 3 years, the 1st defendant agreed to pay monthly rentals at RM16,068 with effect from 27 February 1986.

The 2nd, 3rd and 4th defendants who are directors of the 1st defendant, are sued as guarantors and indemnifiers, pursuant to a guarantee and indemnity dated 27 February 1986 wherein they agreed to be personally liable for all sums due from the 1st defendant under the lease agreement.

The 1st defendant fell into arrears in the payment of the lease rentals as a result of which the plaintiff terminated the lease agreement as at 11 May 1987.

It is not disputed that the equipment were installed by Indra Setia Construction Sdn. Bhd. (from whom the plaintiff had purchased the equipment) at Malacca Village Resort, Ayer Keroh, Malacca, for the use of Lake Golf Hotel Sdn. Bhd. The fact of this is evidenced from the lease agreement itself and that this was an arrangement that was specifically asked for by the 1st defendant. Searches made by the plaintiff at the Registry of Companies also show that Lake Golf Hotel Sdn. Bhd. is someway or another related to the 1st defendant. Under these circumstances, I do not consider that since possession of the equipment was with a third party throughout, it does not effect the liability of the 1st defendant under the lease agreement.

The amount realised from the sale of the repossessed equipment amounted to RM80,000 and in this respect, there is evidence to show that before the sale was effected, the plaintiff had taken all the necessary steps to see that the best price was obtained. In this respect, they had advertised the sale twice in a local daily, "The Star" on 28 July 1987, and 30 July 1987 and that the only response they obtained came from the receivers of Lake Golf Hotel Sdn. Bhd. who offered RM80,000 for the equipment. The plaintiff, through their solicitors' letter dated 20 November 1987, informed all the defendants of the offer made by the receivers of Lake Golf Hotel Sdn. Bhd., and sought their response to the offer within 10 days of the date of the letter, failing which the equipment would be sold to the receivers of Lake Golf Hotel as being the only offer received by the plaintiff. The 1st defendant did not respond to the plaintiff's letter and under such circumstances, I consider that the plaintiff had done all that is reasonably expected of them to see that the sale was conducted in the interests of the defendants as well so that losses can be mitigated.

As for the defendants' submission that since the plaintiff had repossessed the equipment long before the agreement was terminated and that it was the plaintiff who had breached the agreement, I consider that this submission also merits no consideration whatsoever. Under art. 21 of the lease agreement, once the 1st defendant had defaulted in payment of the rentals, the plaintiff is entitled to exercise all or any of the following remedies.

1. To demand payment.
2. To repossess the equipment.
3. To terminate the agreement.

In this instance, the plaintiff decided to protect their interests by repossessing the equipments first before terminating the agreement as Lake Golf Hotel had been placed under receivership. Thus there is no question of the plaintiff breaching the lease agreement as the breach itself was caused by the 1st defendant's failure to meet its obligation to pay the lease rentals.

As no triable issues was raised by the defendants, I had accordingly dismissed their appeal with costs.

Also found at [1989] 2 CLJ 1229